No. 17-1594

In the

Supreme Court of the United States

RETURN MAIL, INC.

Petitioner,

v.

UNITED STATES POSTAL SERVICE AND UNITED STATES

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the government is a "person" who may petition to institute review proceedings under the America Invents Act (AIA).

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus curiae **Intellectual Property Owners Association** (IPO) is an international trade association representing companies and individuals in all industries and fields of technology that own or are interested in intellectual property rights.[1] IPO's membership includes roughly 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as an inventor, author, executive, law firm, or attorney member. Founded in 1972, IPO represents the interests of its members before Congress and the USPTO and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

[2] IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

SUMMARY OF ARGUMENT

The Federal Circuit concluded that "the better reading of 'person'" in the Leahy-Smith America Invents Act, Pub. L. No. 112–29 (2011) ("AIA") § 18(a)(1)(B), "does not exclude the government." *Return Mail, Inc. v. United States Postal Serv.*, 868 F.3d 1350, 1366 (Fed. Cir. 2017). Yet there is no basis, in statute or otherwise, to conclude the United States and its operatives, including Federal agencies (i.e., the "government"), is a "person" that can seek to invalidate a patent by petitioning to institute various post-grant proceedings enacted in the AIA.

Congress chose the term "person" to identify those who may seek patent review under the AIA's post-grant procedures. Although not a universal construction, the term "person" has long been presumed to exclude the sovereign. To overcome this presumption, one must find clear legislative intent to the contrary. Here, neither the statutory context nor the legislative history of the AIA overcomes this presumption. The plain meaning of "person" is consistent with the expressed intent of the AIA's drafters and the statutory scheme. In contrast, adopting a more expansive definition of "person" would thwart legislative intent because it would give the government two bites at the invalidity apple, in different fora, wasting time and resources in contravention of the protections that Congress carefully balanced and implemented in the AIA. *See Return Mail*, 868 F.3d at 1375 (Newman, J., dissenting).

Congress has long sought to avoid such repetitive challenges, recognizing it as an abusive litigation tactic. The AIA's post-grant proceedings were designed to expedite and streamline challenges to patent validity, enabling speedy invalidation of improperly-granted patents while also avoiding serial, wasteful attacks. On this latter point, the application of estoppel, among other checks, is an important component of the policy considerations carefully balanced in post-grant review. In crafting the AIA's post-grant proceedings, as for earlier patent reform efforts, Congress incorporated estoppel provisions that would bar a post-grant petitioner from bringing duplicative invalidity challenges in a later forum. To this end, the AIA's estoppel provisions retain protections similar to those first enacted in *inter partes* reexamination, despite subsequent bills' proposals to narrow the scope of post-grant estoppel, indicating that Congress intended to preserve broad estoppel in the AIA.

Despite the importance of estoppel in the AIA, however, the Federal Circuit found that the "government would enjoy the unique advantage of not being estopped . . . from relitigating grounds raised during a CBM review proceeding." *Return Mail*, 868 F.3d at 1364. Under the Federal Circuit's interpretation of "person," the government would not be estopped from mounting serial patent validity challenges in post-grant review and again in the Court of Federal Claims, the only forum in which a patentee can bring a patent infringement suit against the government. 28 U.S.C. § 1498(a). This outcome, dubbed an "oddity" by the *Return Mail* court, 868 F.3d

at 1364, arises because the AIA's estoppel provisions extend to subsequent proceedings in only specified fora, which do not include the Court of Federal Claims. Such a wasteful and inefficient result is contrary to Congress's intent in enacting the AIA, which requires accused infringers to bring an invalidity challenge in only one forum. Because the Federal Circuit's interpretation runs counter to both the plain language of the AIA and its underlying statutory scheme, it is incorrect.

ARGUMENT

I. In the AIA, as Elsewhere, the Ordinary Meaning of "Person" Excludes the Government

In determining the meaning of "person" in the AIA, Congress' choice of words is of paramount importance. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("*Am. Trucking*"). "Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Id.* "Congress remains free . . . to give the word a broader or different meaning. But before we will assume it has done so, there must be ***some*** indication Congress intended such a result." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012) (emphasis in original).

Accordingly, there is a "strong presumption that the plain language of the statute expresses

congressional intent." *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (internal quotation marks omitted); *see also id.* at 138 (declining to extend entitlement to fees and costs under Equal Access to Justice Act to administrative deportation proceedings in contravention of statute's plain language). This strong presumption "is rebutted only in rare and exceptional circumstances," *id.* at 135 (internal quotations marks omitted)—namely, "when a contrary legislative intent is clearly expressed." *Id.*; *see also Will v. Michigan Dep't State Police*, 491 U.S. 58, 65–66 (1989) ("Our conclusion that a State is not a 'person' within the meaning of [42 U.S.C.] § 1983 is reinforced by Congress' purpose in enacting the statute."); *Am. Trucking*, 310 U.S. at 546–47 ("We are especially hesitant to conclude that Congress intended to grant the [Interstate Commerce Commission] other than the customary power . . . in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual powers . . .").

Because Congress used the term "person" in the AIA without providing a special definition, this Court must presume that Congress intended the term "person" in the Act to have its plain meaning. *See, e.g.*, *Mohamad*, 566 U.S. at 455. The Dictionary Act, 1 U.S.C. § 1 *et seq.*, sets forth the customary meaning of the term "person," as used in federal statutes. *See, e.g.*, *Inyo Cty., Cal. v. Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, 538 U.S. 701, 713 (2003) (Stevens, J., concurring). The Dictionary Act provides that, "unless the context indicates otherwise," the term "person" means "corporations,

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2012). Therefore, unless the context "indicates otherwise," *id.*, the ordinary meaning of "person"—which does not include the government—must control. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("[U]nless there is something about the [statutory] context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question" of the scope of the term "person") (quoting 1 U.S.C. § 1). Moreover, because Congress provided that a "person" could petition for *inter partes* review, post-grant review, and covered business method (CBM) proceedings, the meaning of this term should be consistent across all AIA patent review proceedings.[3]

No statutory context, legislative history, or other evidence indicates that "person" has a meaning other than its customary definition. *See generally* Section B, *infra*. To the contrary, Congress intended to preserve estoppel in the AIA's post-grant proceedings as a check on wasteful litigation.

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[3] *See* 35 U.S.C. § 311 (2012) ("[A] person who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent."); *id.* § 321 (2012) ("[A] person who is not the owner of a patent may file with the Office a petition to institute a post-grant review of the patent."); AIA § 18(a)(1)(B) ("A person may not file a petition for a transitional proceeding with respect to a covered business method patent unless the person or the person's real party in interest or privy has been sued for infringement of the patent or has been charged with infringement under that patent.").

II. The AIA's Legislative History Does Not Contain Indicia that Congress Intended "Person" To Include the Government

This Court's "conventional reading of 'person' may . . . be disregarded if the purpose, the subject matter, the context, the legislative history, or the executive interpretation of the statute indicate an intent . . . to bring state or nation within the scope of the law." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) (internal alterations omitted); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (noting the presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary"). Here, there is no statutory context dictating a meaning of "person" other than its customary meaning, and construing "person" in this manner implements Congressional intent. The AIA's legislative history demonstrates Congress's long-standing interest in preventing serial identical attacks on patent validity. Congress's solution to this problem—in the AIA as well as in prior bills and statutes—includes strong estoppel provisions. There is simply no indication that Congress intended the government to avoid the restrictions that the AIA imposes on all others. Affirming the Federal Circuit's interpretation and permitting the government to circumvent these protections would frustrate the AIA's statutory scheme. Therefore, the term "person" in the Act should be given its usual meaning.

A. The AIA's Estoppel Provisions Do Not Extend to the Government

The AIA's estoppel provisions dictate that estoppel arising from post-grant challenges will attach later in proceedings before the Patent Office, 35 U.S.C. §§ 315(e)(1), 325(e)(1), or "other proceedings." *Id.* §§ 315(e)(2), 325(e)(2) (2012). These "other proceedings" are clearly specified:

> The petitioner . . . of a claim in a patent under this chapter that results in a final written decision . . . may not assert either in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission . . . that the claim is invalid . . . .

Id. § 315(e)(2) (*inter partes* review); *see also id.* § 325(e)(2) (post-grant review). Congress therefore explicitly identified only three fora in which estoppel against a "person" would lie: the Patent Office, a "district court[ ]" under 28 U.S.C. § 1338 (2011), or the International Trade Commission. Not included in this list is the Court of Federal Claims. Its absence is significant because section 1498 provides that the Court of Federal Claims is the only forum in which a patentee can seek recourse against the government for the use or manufacture of a claimed invention. 28

U.S.C. § 1498(a) (1996).[4] Because the AIA's estoppel provisions do not identify the Court of Federal Claims, the government is not subject to estoppel in that forum. *Return Mail*, 868 F.3d at 1364. The operation of the AIA's estoppel is consistent with the usual meaning of "person." The fora enumerated in the AIA do not, and need not, include the Court of Federal Claims, because a "person" does not typically include the government.

B. Interpreting "Person" to Include the Government Thwarts Congress's Careful Balance of Providing an Efficient Forum for Challenging Patent Validity While Avoiding Abusive, Repetitive Validity Attacks

The Federal Circuit's interpretation of "person" creates negative consequences for patentees that are

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[4] "Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture." 28 U.S.C. § 1498(a) (1996). The basis for a patentee's recovery under Section 1498(a) "is the doctrine of eminent domain." *Motorola, Inc. v. United States*, 729 F.2d 765, 768 (Fed. Cir. 1984) (citing *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290 (1912)). As the Federal Circuit recognized, section 1498 "creates its own independent cause of action, which is only parallel and not identical to an infringement action under the Patent Act." *Return Mail*, 868 F.3d at 1361 (internal quotation marks omitted).

plainly at odds with the policies underlying enactment of the AIA. Congress long sought to promote patent law reform by creating comparatively efficient and cost-effective proceedings to invalidate patents that should not have been granted.[5] Although this particular goal, absent more, might not bar government agencies or operatives from challenging patent validity at the Patent Office, the AIA's drafters also recognized the importance of precluding repetitive, wasteful attacks on patents. They built various protections into the post-grant proceedings—including estoppel—to avoid such challenges.

The *Return Mail* court found that that the government is a "person" in part because, in its view, no policy reason justified precluding the government from seeking post-grant review under the AIA. *Return Mail*, 868 F.3d at 1366 ("There does not appear to be any reason . . . to curtail the ability of the government to initiate a CBM proceeding when, like a party sued in federal district court or the ITC, it has interests at stake with respect to the patent it has been accused of infringing."). But the court overlooked a key policy reason why the government should be excluded from the scope of "person." Permitting the government to institute post-grant review would flout the AIA's carefully-chosen estoppel

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[5] In enacting the *inter partes* reexamination proceeding, the House Committee noted that "[n]umerous witnesses have suggested that the volume of lawsuits in district courts will be reduced if third parties can be encouraged to use reexamination by giving them an opportunity to argue their case for patent invalidity in the USPTO." 145 CONG. REC. H11804 (daily ed. Nov. 9, 1999) (Joint Explanatory Statement of the Committee of Conference).

protections, and is inconsistent with Congressional intent.

1. Prior to the AIA, Congress Relied on Estoppel to Avoid Repetitive Attacks on Patent Validity

A review of the legislative record leading up to the AIA reveals Congress's long-standing interest in preventing serial patent challenges in different fora. Broad post-grant review, without appropriate checks, could "subject patent owners to 'serial post-grant challenges' and would deny patent owners the 'right to expect quiet title at some point without facing an endless series of challenges.'" *See, e.g.*, Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 435, 603 (2011) (quoting *Patent Reform Act of 2007: Hearing on H.R. 1908 Before the Subcomm. on Courts, the Internet, and Intellectual Prop.*, 110th Cong. 55 (2007)); *see also Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1327 (Fed. Cir. 2016) (Newman, J., dissenting) (reviewing legislative history of AIA), *overruled on other grounds by Aqua Prods., Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017).

To avoid this outcome, estoppel—specifically, estoppel of a "person"—has been an important component of patent invalidity proceedings for more than a decade prior to the AIA, as seen in the 1999 enactment of the *inter partes* reexamination

procedure.[6] *Inter partes* reexamination was created nearly 20 years ago as an avenue for "[a]ny person" to challenge patent validity. 35 U.S.C. § 311(a) (1999). To counterbalance a third party's right to bring this challenge, the third party would be subject to estoppel:

> A third-party requester . . . is estopped from asserting at a later time, in any civil action arising in whole or in part under section 1338 of title 28 [U.S.C.] the invalidity of any claim finally determined to be valid and patentable on any ground which the third-party requester raised or could have raised during the inter partes reexamination proceedings.

35 U.S.C. § 315(c) (1999). Notably, Congress intended the accompanying estoppel to attach broadly because it covered challenges that the petitioner "could have raised" as well as those actually raised in the proceeding. *Id.* Broad estoppel was a critical mechanism to effect the balance of concerns raised during debate over *inter partes* reexamination. In introducing this proceeding, members of the House of Representatives explained that "[t]o prevent harassment, anyone who requests inter partes

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[6] The *inter partes* reexamination provisions are set forth in the Intellectual Property and Communications Omnibus Reform Act of 1999, S. 1948, 106th Cong. (1999), incorporated by cross-reference in the conference report to the Consolidated Appropriations Act, 2000, Pub. L. 106-113 (1999).

reexamination must identify the real party in interest[7] and third-party requesters . . . are estopped from raising in a subsequent court action or inter partes reexamination any issue of patent validity that they raised or could have raised during such inter partes reexamination." 145 CONG. REC. H11805 (daily ed. Nov. 9, 1999) (Joint Explanatory Statement of the Committee of Conference). Congress therefore included estoppel in *inter partes* reexamination to prevent patent owners from harassment via serial identical attacks on patent validity.

Although legislative views on the structure of patent validity proceedings continued to evolve in the years leading up to the enactment of the AIA, the proposed bills consistently reflect the long-standing importance of maintaining estoppel protections. When subsequent bills were introduced to reshape the *inter partes* reexamination proceeding (among other parts of the Patent Act) or otherwise change the scope of post-grant review,[8] they included estoppel provisions in some form. Notably, multiple bills proposed (but not ultimately enacted) leading up to the AIA contained estoppel provisions that were narrowed in some respect compared to the protections in *inter partes* reexamination. Although these proposals sought to decrease the scope of estoppel, broad estoppel was ultimately retained in the

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[7] 35 U.S.C. § 311(b)(1) (1999) (request for *inter partes* reexamination must include identity of real party in interest).

[8] *See, e.g.*, Jeffrey Kushan, *The Fruits of the Convoluted Road to Patent Reform: The New Invalidity Proceedings of the Patent & Trademark Office*, 30 YALE L. & POL. REV. 385, 396–403 (2012) (reviewing legislative history of invalidity proceedings reform).

proposed post-grant proceedings as a means to prevent harassing litigation, which was a continuing concern of lawmakers.

As an early example, the Patent Reexamination Enhancement Act of 2001 ("2001 Act") was introduced with a goal of amending the *inter partes* reexamination proceeding so that, *inter alia*, estoppel would attach after the Patent Office reached a final determination of patent validity. Patent Reexamination Enhancement Act of 2001, H.R. 2231, 107th Cong. § 2(c) (2001). Although this proposed amendment would narrow estoppel in the proceeding, a requester would, "at the conclusion of [reexamination] be barred (estopped) from challenging the patent in any other judicial or [Patent Office] proceeding. Any issue actually raised or that could have been raised based on the evidence . . . before the Patent Office will still be barred . . ." 147 CONG. REC. E1191 (daily ed. June 25, 2001) (statement of Rep. Lofgren). Rep. Lofgren, sponsor of the 2001 Act, noted that the bill was designed to "ensure that the reexamination procedure retains important safeguards to prevent third parties from using the procedure to harass patent owners who hold valid patents. . . . [A]s noted, the estoppel imposed on unsuccessful challengers should prevent frivolous challenges. Those who challenge the patent in the [Patent Office] will not be able to challenge the patent later in a court on validity issues." *Id.*

A few years later, the Patent Quality Assistance Act of 2004 ("2004 Act") was introduced to expand the scope of post-grant invalidation

proceedings by, among other amendments, "relaxing . . . estoppel provisions" of the *inter partes* reexamination procedure by eliminating estoppel for arguments the challenger "could have raised" in reexamination. *See* 150 CONG. REC. E1936 (daily ed. Oct. 11, 2004) (statement of Rep. Berman); *see also* Patent Quality Assistance Act of 2004, H.R. 5299, 108th Cong. § 7 (2004).[9] Despite intending to weaken the scope of estoppel in post-grant review proceedings, contemporaneous policymakers nevertheless recognized the importance of maintaining estoppel in some form. *Patent Quality Improvement: Post-Grant Opposition: Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property, H. Comm. on the Judiciary*, 108th Cong. 32 (2004) (statement of Michael Kirk, Executive Director, American Intellectual Property Law Association) ("A very important aspect of any post-grant-opposition proceeding is the effect the decision will have on the parties. If the estoppel provision is too harsh, no one will use the procedure .

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[9] The 2004 Act also created a new patent opposition proceeding which permitted broad challenges within nine months of a patent's issuance. *See* 2004 Act §§ 2, 323-24. The new opposition proceeding incorporated a fairly narrow estoppel provision that was designed to bar an opposer "from raising, in any subsequent proceeding involving that opposer . . . any issue of fact or law actually decided and necessary to the determination of that issue," *id.* § 336(a)(1), with a limited exception for additional factual evidence necessary and material to the final determination "that could not reasonably been discovered or presented . . . by that opposer." *Id.* § 336(a)(2). The 2004 Act also would have barred an opposer from bringing an *inter partes* reexamination proceeding "on the same claim and on the same issue" as in the opposition. *Id.* § 340(a).

. . If it is too lenient, patentees may be subject to needless repetitive challenges by the same party.").[10] Thus, as before, estoppel was recognized as an important mechanism to curb harassing litigation tactics, although finding the right balance of protections remained a challenge.

Similarly, the drafters of the Patent Reform Act of 2009 ("2009 Act") sought to re-shape *inter partes* reexamination by making the procedure more robust and efficient while retaining estoppel, albeit comparatively narrowed. *See* Patent Reform Act of 2009, S. 515, 111th Cong. (2009).[11] Similar to the

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[10] *See also id.* at 13 (statement of Jeffrey Kushan on behalf of Genentech, Inc.) ("The challenge for Congress . . . is to devise a system that not only provides a rigorous inquiry into the validity of the patent but is also structured to prevent harassment of the owners of valid patents. A system that allows frivolous challenges to be made or which can be used to tie up a patent in a long and endless administrative proceeding would fail to meet the needs of those users of the patents community and the needs of the public.").

[11] As observed by Senator Leahy, under the 2009 Act, a "third-party requester is still estopped from reasserting patent invalidity in court on any ground actually raised in an inter partes reexamination, but the 'or could have raised' bar is struck. With respect to serial requests for inter partes reexamination by the same third party requester or its privies, a final decision . . . will continue to have claim-preclusive effect against subsequent requests." S. REP. NO. 111-18, at 17 (2009). The 2009 Act also created a new post-grant opposition procedure for use within the first twelve months after a patent issued. Similar to the 2004 Act's post-grant review proceeding, this opposition contained estoppel provisions that precluded a petitioner "from improperly mounting multiple challenges of a patent or initiating a challenge after an unfavorable final decision in a civil action based on grounds the petitioner raised or could have raised." *Id.*

amendments proposed in the 2004 Act, the 2009 Act drafters removed validity challenges that "could have raised" from the scope of the estoppel. The underlying policy considerations guiding the 2009 Act's structure remain familiar. In recommending passage of the 2009 Act, Senator Leahy cautioned that, although its amendments were intended to remove disincentives to the current reexamination procedure, "the changes . . . are not to be used as tools for harassment . . . through repeated litigation and administrative attacks on the validity of a patent. Doing so would frustrate the purpose of the section as providing quick and cost effective alternatives to litigation." S. REP. NO. 111-18, at 18 (2009).

Although these exemplary patent reform bills were not enacted, they reflect long-standing legislative interests in preventing repetitive identical attacks on patent validity. This observation is significant for a statutory interpretation analysis, such as in the case at bar, because "the initial focus must be on the state of the law at the time the legislation was enacted." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982) ("More precisely, we must examine Congress' perception of the law that it was shaping or reshaping."). Lawmakers first recognized the importance of strong estoppel protections in enacting *inter partes* reexamination. These subsequent proposed acts demonstrate estoppel's continuing importance as a tool regularly used by Congress to achieve its policy goals in crafting patent review proceedings. In its efforts to improve the *inter partes* reexamination procedure and to create new post-

grant review mechanisms, Congress preserved estoppel as an important safeguard against abusive litigation tactics against patent holders. It is little surprise, therefore, that Congress also recognized the importance of estoppel when enacting the AIA, and incorporated it into all AIA post-grant proceedings.

2. Consistent with Earlier Legislative Acts, Congress Preserved Estoppel in the AIA's Post-Grant Proceedings as an Important Check on Abusive Litigation

In general, the policies and considerations implemented in the AIA's post-grant proceedings echo those of earlier bills. *See supra* Section (II)(B)(1). Critically, estoppel remained essential to achieving these legislative goals. *Return Mail*, 868 F.3d at 1374 (Newman, J., dissenting) ("The estoppel provision is the backbone of the AIA, for it is through estoppel that the AIA achieves its purpose of expeditious and economical resolution of patent disputes without resort to the courts.").

Congress intended the AIA's post-grant proceedings to reduce abusive litigation tactics, including serial, repetitive attacks on patent validity. In describing the "overarching purpose and effect" of the AIA, Senator Kyl noted that the act would "ultimately reduce litigation costs" and "cure some very clear litigation abuses that have arisen under the current rules, abuses that have done serious harm to American businesses." 157 CONG. REC. S5319

(daily ed. Sept. 6, 2011) (statement of Sen. Kyl); *see also* 157 CONG. REC. S1380 (daily ed. Mar. 8, 2011) (statement of Sen. Grassley) (recognizing need to "curb litigation abuses"). On this point, the post-grant review proceedings created in the Act were intended to "enable early challenges to patents, but also protect the rights of inventors and patent owners against endless litigation," and in front of different tribunals. 157 CONG. REC. S952 (daily ed. Feb. 28, 2011) (statement of Sen. Grassley); *see also* 157 CONG. REC. S1364 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer) ("Too many district courts have been content to allow litigation to grind on while a reexamination is being conducted, forcing the parties to fight in two fora at the same time. This is unacceptable, and would be contrary to the fundamental purpose of . . . provid[ing] a cost efficient alternative to litigation.").

To achieve this balance, as in previous bills, estoppel provisions featured as a crucial part of the AIA's patent review proceedings.[12]

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[12] Congress recognized estoppel's value for the various types of post-grant proceedings, including covered business method (CBM) reviews. 35 U.S.C. §§ 315(e) (*inter partes* review), 325(e) (post-grant review); *Credit Acceptance Corp. v. Westlake Servs.*, 859 F.3d 1044, 1049 (Fed. Cir. 2017) (noting that post-grant review estoppel "also governs CBM review proceedings under AIA § 18"). As one witness noted, because "[w]e don't want to have legitimate inventions given to infringers to have second, third, and fourth bites at the apple. . . I think it's a good idea . . . to look at building an estoppel [into CBM proceedings], just like we built an estoppel into the post-grant review and inter partes re-exam procedure." *America Invents Act: Hearing before the Subcommittee on Intellectual Property, Competition, and the*

> [The AIA was designed to] include a strengthened estoppel standard to prevent petitioners from raising in a subsequent challenge the same patent issues that were raised or reasonably could have been raised in a prior challenge. The bill would significantly reduce the ability to use post-grant procedures for abusive serial challenges to patents. These new procedures would also provide faster, less costly alternatives to civil litigation to challenge patents.

157 CONG. REC. S952 (Feb. 28, 2011) (statement of Sen. Grassley).[13] These estoppel protections were widely recognized for their value in limiting harassing litigation.[14] According to the Patent Office

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Internet of the H. Comm. on the Judiciary, 112th Cong. 119 (2011) ("2011 AIA Hearing") (statement of Steven Miller, V.P. and General Counsel, Procter & Gamble Co.).

[13] Other policymakers expressed similar appreciation for estoppel protections. *See* 157 CONG. REC. S1041–42 (Mar. 1, 2011) (statement of Sen. Kyl) ("The present bill does . . . impose limits on serial challenges . . . The bill's enhanced administrative estoppel will effectively bar a third party or related parties from invoking ex parte reexamination against a patent if that third party has already employed post-grant or inter partes review against that patent. Also, the bill allows the Patent Office to reject any request for a proceeding . . . if the same or substantially the same prior art or arguments previously were presented to the Office with respect to that patent.").

[14] 157 CONG. REC. S1367 (daily ed. Mar. 8, 2011) (statement of Sen. Kohl) (recognizing that "[p]atent protection will be stronger

Director, David Kappos, "I believe there are significant advantages for patentees who successfully go through the post grant system—in this case, inter partes review—because of those estoppel provisions. Those estoppel provisions mean that your patent is largely unchallengeable again by the same party." 2011 AIA Hearing 52–53.

As further protection, estoppel in the AIA's post-grant proceedings was designed to bar those in privity with the challenger from bringing the same claims subsequently at the Patent Office or in other proceedings. 35 U.S.C. §§ 315(e)(1–2), 325(e)(1–2).

> [A] party that uses inter partes or post-grant review is estopped from raising in a subsequent PTO proceeding any issue that he raised or reasonably could have raised in the post-grant or inter partes review. This effectively bars such a party or his real parties in interest or privies from later using inter partes review.

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with the inclusion of 'could have raised' estoppel, strong administrative estoppel, and . . . authority for the [Patent Office] to reject petitions by third parties and order joinder of related parties."); 157 CONG. REC. S1326 (daily ed. Mar. 7, 2011) (statement of Sen. Sessions) ("The bill also includes many protections that were long sought by inventors and patent owners. It preserves estoppel against relitigating in court those issues that an inter partes challenger reasonably could have raised in his administrative challenge."); *see also* 2011 AIA Hearing 93 (statement of John Vaughn, Executive V.P. of Association of American Universities) (noting such provisions "reduce the prospect of using the inter partes procedure to mount harassing serial challenges").

157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (citing 35 U.S.C. §§ 315(e)(1), 325(e)(1)); *accord* 35 U.S.C. § 317 (1999) (prohibiting *inter partes* reexamination of any claim "on the basis of issues which that party or its privies raised or could have raised" in civil litigation or a previous *inter partes* reexamination).

The continued inclusion of estoppel provisions in patent review proceedings, enacted or otherwise, indicates that estoppel was "part of the contemporary legal context in which Congress legislated" when crafting the AIA's post-grant proceedings. *Merrill Lynch*, 456 U.S. at 381. The *Merrill Lynch* rationale is instructive. In that case, the Court addressed the question of whether a private cause of action is implicit in a federal statutory scheme (the Commodity Exchange Act (CEA), codified at 7 U.S.C. § 1 (1976) *et seq.*) "when the statute by its terms is silent on that issue." *Id.* at 378. In concluding that a private cause of action was implied, the *Merrill Lynch* Court observed that "the fact that a comprehensive reexamination and significant amendment of" the CEA "left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." *Id.* at 381–82. A review of the CEA's legislative history "persuasively indicates that preservation of the remedy was indeed what Congress actually intended." *Id.* at 382.

In the present case, the Federal Circuit recognized that "absence of Congressional guidance"

created a silence as to whether "person" was intended to apply to the government. *Return Mail*, 868 F.3d at 1366; *see also id.* at 1374 (Newman, J., dissenting). However, preserving estoppel provisions in the AIA's post-grant statutes, consistent with the long-standing use of estoppel in similar proceedings, demonstrate that Congress intended to not limit the scope of these protections. This Court should not adopt an interpretation of "person" that would be at variance with this legislative policy. *See Am. Trucking*, 310 U.S. at 543; *see also id.* at 546–47 (expressing "hesitan[cy]" about giving federal commission more than usual power in absence of legislative intent).

III. There Is No *Per Se* Rule Against Estopping the Government

The Federal Circuit acknowledges that the government will not be subject to estoppel after an unsuccessful CBM proceeding. *Return Mail*, 868 F.3d at 1364. Although the Government has not been subject to estoppel in other contexts, *see Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421–22 (1990) ("*Richmond*"), the unavailability in one context does not show that Congress intended for the government to be free from the estoppel flowing from AIA post-grant proceedings. *Richmond* stands for the unremarkable proposition that the government is not equitably estopped from denying statutory benefits to a claimant seeking public funds even if a government employee misapplies a statute. *See id.* at 434. The overarching premise supporting the *Richmond* decision is that "the United States is neither bound nor estopped by acts of its officers or agents in

entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Id.* (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408–09 (1917)).

The *Richmond* Court recognized that there was no *per se* rule precluding government estoppel. *Richmond*, 496 U.S. at 423 ("We leave for another day whether an estoppel claim could ever succeed against the Government."). There is no basis in *Richmond* to conclude that the AIA's estoppel should not operate against the government. Indeed, the *Richmond* opinion expressly leaves that door open. *See* 496 U.S. at 426 ("[W]e decline today to accept the . . . argument for an across-the-board no-estoppel rule."); *see also id.* at 426 ("In our cases . . . reserving the possibility that estoppel might lie on some facts, we have held only that the particular facts presented were insufficient."). Neither the *Return Mail* court nor the United States Postal Service has identified legislative history or sound policy to explain why Congress would have intended for the government to be able to make repeated identical patent validity attacks, and *Richmond* does not lead to a different conclusion.

The question of whether the government can be estopped due to the improper actions of its employees is not an issue in the present case at all. Here, no governmental entity misapplied a statute in such a way as to bind the government to an outcome that would otherwise run afoul of what the statute dictates. Furthermore, the nature of the estoppel considered in *Richmond* is materially different than the estoppel built directly into the AIA provisions.

The equitable estoppel at issue in *Richmond* "rests on misleading." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685 (2014). Unlike the federal employee in *Richmond* who provided misinformation to the benefits claimant, there are no wrongful activities at play here—only the scope and meaning of a statutory term, "person," and whether certain patent challenges are permissible. Moreover, *Richmond* narrowly relates to the disbursement of public funds to claimants, and, in denying that estoppel attached, the *Richmond* Court observed that it took "a most strict approach to estoppel claims involving public funds." *Id.* at 426. The ramifications of the only question before this Court is whether the government should be exempted from the estoppel that Congress expressly included in the AIA to bind any "person" attempting to challenge patent validity.

The *Richmond* Court was also concerned about "operation of estoppel against the Government in the context of payment of money from the Treasury" on the grounds that it "could in fact render the Appropriations Clause a nullity." *Richmond*, 496 U.S. at 428. But concerns over statutory nullification actually favor Petitioner Return Mail's position in this case. If this Court affirms the Federal Circuit's statutory interpretation, which abrogates the statutory estoppel provisions for a particular class of petitioner, Congress's careful balance of considerations in enacting the AIA will be frustrated.

IV. The Government's Other Patent Rights Do Not Overcome the Presumption That "Person" Excludes the Government

The Federal Circuit justified its interpretation by reasoning, *inter alia*, that "[t]he AIA does not appear to use the term 'person' to exclude the government in other provisions," such as those bestowing intervening rights on certain "persons." *Return Mail*, 868 F.3d at 1365 (citing 35 U.S.C. §§ 318(c), 328(c) (2012)).[15]

The legislative history of section 1498 reveals that Congress intended for the government to have the defense of intervening rights. Specifically, in enacting section 1498, Congress intended that the government have the ability to plead any defense to patent infringement that would be available to a private party. *See Motorola*, 729 F.2d at 769. The original version of section 1498 expressly provided that "the United States may avail itself of ***any and all defenses***, general or special, ***which might be pleaded by a defendant in an action for infringement***." *Id.* (emphases added).[16] This language was "omitted as unnecessary" in later versions of section 1498, but, "[i]n absence of a

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[15] These provisions refer to the intervening rights "of any person who made, purchased, or used within the United States, or imported into the United States, anything patented" by an amended or new claim following a post-grant proceeding. 35 U.S.C. §§ 318(c), 328(c) (2012); *see also id.* § 252 (1999) (governing effect of reissued patents).

[16] The *Motorola* court quoted ch. 423, 36 Stat. 851 (cited herein as An Act to Provide Additional Protection for Owners of Patents of the United States, and for Other Purposes, Pub. L. No. 305 (1910), noting that this statute was originally codified in Title 35 but later removed and re-codified in Title 28. 729 F.2d at 769 & n.5.

statutory restriction, any defense available to a private party is equally available to the United States." *Id.* (quoting Revisor's Notes to 28 U.S.C. § 1498,at 467 (1973)).

Intervening rights is a defense to patent infringement. *See BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 1 F.3d 1214, 1220 (Fed. Cir. 1993) ("The accused infringer may raise the defense of intervening rights only when none of the infringed claims of the reissue patent were present in the original patent." (citing 35 U.S.C. § 252 (1988))). Therefore, in section 1498 actions, the government may avail itself of the intervening right defense. The legislative history of section 1498 thus demonstrates affirmative Congressional intent to overcome the presumption that a "person" in the particular context of 35 U.S.C. §§ 252, 318, and 328 does not include the government.

Section 207 of the Patent Act also reflects affirmative legislative intent to overcome this presumption with respect to certain rights of a "person" in 35 U.S.C. § 102 (2015) (a "person" can be entitled to a patent if certain conditions are met) and § 118 (2012) (a "person" may, under specified circumstances, "make an application for patent"). Section 207 empowers the government to protect, develop, and commercialize patent rights. 35 U.S.C. § 207 (2012). In addition to allowing "Federal agenc[ies]" to "apply for, obtain, and maintain" patents, section 207 authorizes the agencies to grant various kinds of licenses, to transfer title of inventions, and to "undertake all other suitable and

necessary steps to protect and administer rights to federally owned inventions." 35 U.S.C. § 207(a)(1–4). Because the government has the affirmative right to apply for a patent, interpreting sections 102 and 118 to exclude the government would conflict with section 207. Under these circumstances, the presumption that "person" in sections 102 and 118 is overcome.

Importantly, section 207 does not contain or imply provisions by which a Federal agency can seek to invalidate patents and itself does not use the term "person" when granting the right, for example, to apply for, obtain, and maintain" patents. 35 U.S.C. § 207(a)(1). Instead, it uses the term "Federal agenc[ies]." *Id.* § 207(a). As a result, section 207 does not demonstrate that "person" in the AIA includes the government.

Section 303 of the Patent Act likewise does not overcome the presumption that "person" does not include the government. Under section 303, the Patent Office Director "[o]n his own initiative . . . may determine whether a substantial new question of patentability is raised" that would require patent reexamination. *See* 35 U.S.C. §§ 303–04 (2012). Congress explicitly allowed the Patent Office Director to bring a challenge to patent validity under specified circumstances. When a statute or rule enumerates specific actions, it should not ordinarily be extended to cover possibilities not explicitly addressed therein. *E.g.*, *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167–68 (1993) (declining to require heightened pleading for claims other than exceptions listed in FED. R. CIV.

P. 9(b), on the grounds that "[e]*xpressio unius est exclusio alterius*"). The explicit authorization in Section 303 indicates that Federal agencies ***do not*** otherwise have the right to initiate post-grant proceedings under the AIA. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 195 (1978) (although Endangered Species Act (ESA) created "a number of limited 'hardship exceptions," "there are no exemptions in the [ESA] for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt.") (affirming injunction of expensive dam project threatening endangered species).

Considering these statutes together, in light of traditional principles of statutory construction, "the statutory context strengthens—not undermines—the conclusion that Congress intended to create a cause of action" to invalidate a patent using the AIA's procedures by a "person" in the customary sense, rather than under an expansive interpretation of that term that would include the government. *Mohamad*, 566 U.S. at 455.

CONCLUSION

The term "person" in the AIA should be givenits customary meaning of not including the government because Congress never explicitly suggested such a meaning and such interpretation would frustrate the AIA's overall structure and purpose. Allowing the government to take two identical bites at the invalidity apple—in post-grant

proceedings and in the Court of Federal Claims—would upset the careful balance Congress struck when it enacted the AIA. Accordingly, the term "person" in the AIA should be construed to exclude the government.

Respectfully submitted,

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APPENDIX

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1. IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

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